United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2090

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RICHARD E. KASPEREK,
Petitioner-Appellant,

vs.

DONALD RUMSFELD, Secretary of Defense,
and
COMMANDANT, UNITED STATES MARINE CORPS
and
CAPTAIN E. D. MILLER,
Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

REPLY BRIEF OF APPELLANT

ROBERT C. MACEK, ESQ.,
Clinton House,
556 Franklin Street,
Buffalo, New York 14202,
(716) 883-5000,

PHILIP B. ABRAMOWITZ, ESQ.,
815 Liberty Bank Building,
Buffalo, New York 14202,
(716) 856-5400,

Attorneys for Appellant.

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
26 CENTER ST., BATAVIA, N. Y. 14020
716-343-0457

B
P/S

INDEX.

TABLE OF CASES.

page

STATUTES.

This reply brief is submitted in order to respond to certain misstatements of fact contained in Appellees' brief, and to answer certain arguments of law not fully anticipated in Appellant's opening brief. This brief will confine itself to the issues of habeas corpus jurisdiction and the merits of the contract claim, and will not add anything to Appellant's discussion of the other jurisdictional issues on the instant question.

POINT I

THE DISTRICT COURT HAD JURISDICTION IN HABEAS CORPUS.

The Government argues that the District Court had no jurisdiction to hear this case. In so arguing, it misstates certain facts in the record.

The Government's brief states (p. 7) that Kasperek "was contacted by Captain Miller of the local Marine Corps office and instructed as to his obligation to return to Camp LeJeune." This characterization plays down to a remarkable degree the amount of control and dominion exercised by Captain Miller over Kasperek. First, Kasperek, rather than being bailed on the local marijuana charge,* was held in jail for ten days solely because of the Marine Corps detainer on him. After his release on emergency leave after his father's death on May 5, 1976, which release was effected by Captain Miller's lifting of the detainer, Kasperek was subject to and obedient to military orders: He reported to Captain Miller on May 11 for the Captain's determination whether to allow Kasperek to remain free on

---

*This charge has since been adjourned "in contemplation of dismissal" under New York Criminal Procedure Law §170.56.

leave pending the resolution of the marijuana charge, or to arrest him and have him incarcerated. Captain Miller ordered Kasperek to report back on May 14 (later postponed once to May 17). When Kasperek failed to report to Captain Miller on May 17 and before the temporary restraining order signed by Judge Curtin reached Captain Miller, the Captain sent Marines out to seize Kasperek (who were recalled after the temporary restraining order was served).

It is settled that mere "status as a member of the Armed Forces" is sufficient restraint to constitute "custody" within the meaning of 28 U.S.C. §2241. Schonbrun v. Commanding Officer, 403 F.2d 371, 373 (2d. Cir. 1968), citing United States ex rel Altieri v. Flint, 54 F.Supp. 889 (D.Conn. 1943), affirmed on opinion below, 142 F.2d 62 (2d Cir. 1944), and Hammond v. Lenfest, 398 F.2d 715, 710-712 (2d Cir. 1958). Although an exception to this rule may exist when a serviceman is A.W.O.L. and the military authorities cannot find him to direct orders to him, see United States ex rel Lohmeyer v. Laird, 318 F.Supp. 94, 97-98 (D.Md. 1970), Rudick v. Laird, 412 F.2d 16, 20-21 (2d Cir. 1968)(dictum); Johnson v. Laird, 435 F.2d 493 (9th Cir. 1970), that exception does not apply here: Kasperek was clearly subject to and obedient to military orders at the time this action was brought, and thus "in custody" in the territorial jurisdiction of the District Court.

The position here asserted by the Government was analyzed in Hansen, "The Jurisdictional Bases of Federal Court Review of Denial of Administrative Discharges from the Military, I", 3 SSLR 4001, 4003 (March, 1971):

> The Government ... contend[s] that the restraint placed on the liberties of servicemen have definite limits of time and place. Government counsel, on behalf of the Military services, argues that a serviceman is not in military custody for jurisdictional purposes at certain times and in certain places, although, if pressed, they would presumably admit that under the same circumstances the serviceman is not free of all military restraint. Indeed it is typical for one agent of the Government to be arguing in court that a particular serviceman is not presently in military custody within that court's jurisdiction at the same moment that other agents of the Government are directing military orders to that individual, addressed to the very location where it is urged that he is free from restraint. Nor will the Government eschew its power to enforce those same orders by physical power, if necessary, in the "non-custodial" situs. ...
>
> As long as the servicemen's presence in a particular location is authorized ... ipso facto he is there subject to military supervision, and hence in military custody.

Numerous courts have rejected the Government's argument and found, reasonably enough, that when a serviceman is in custody, he is in custody where he is. See Lohmeyer, supra.; Laxer v. Cushman, 300 F.Supp. 920 (D.Mass. 1969); Donigian v. Laird, 408 F.Supp. 449 (D.Md. 1969); Crane v. Laird, 315 F.Supp. 837 (D.Ore. 1975); Crane v. Coleman, 389 F.Supp. 22 (E.D.Pa. 1975); cf. Strait v. Laird, 406 U.S. 341 (1972).

The other requisite for habeas corpus jurisdiction -- a proper custodian within the reach of the District Court's process -- is also satisfied in this case. Captain Miller, by his assertion of lawful authority over Private Kasperek, placed him in custody and is thus a proper habeas custodian.*

The fact that Captain Miller is not the commander of Kasperek's permanent duty station does not alter his status as habeas custodian.

---

*Alternatively, as argued at pp. 17-21 of our opening brief, he thereby acted as "the agent by which the other respondents became present" in the forum district.

He had the authority to issue orders to Kasperek, and did; no more is required under the decisions of this Court. In United States ex rel Altieri v. Flint, supra., the district court held that the commander of the induction center, who was no more Altieri's permanent duty station commander than Captain Miller was Kasperek's, was a proper habeas corpus respondent, even when Altieri was on leave and subject only to an order to return at a later time for transport.

> It is he ... who, pursuant to the regulations of the military establishment, has ordered him to ... travel under military supervision at a specified future date. His order, tested by the plenitude of the underlying military authority therefor, was in effect a continuing and effective assertion of custody — a custody loose at the moment but a custody which may at any time be made as close as the military establishment by further order or regulation shall direct. 54 F.Supp. at 892 (emphasis added).

The District Court's judgment was affirmed by this Court on the opinion below, 142 F.2d 62, and the case has since been cited on the jurisdiction issue, Schonbrun, supra, 403 F.2d at 373.

Other courts have rejected the argument that only the serviceman's immediate commander is a proper custodian. In Meck v. Commanding Officer, 452 F.2d 758 (3rd Cir. 1971), the petitioner, who had been stationed at Fort Lewis, Washington, surrendered himself to military authorities in the Eastern District of Pennsylvania after approximately three months of absence without leave. The Court held that the commanding officer at the Valley Forge General Hospital, to whom Meck had surrendered himself, was a proper habeas respondent, 452 F.2d at 763. In Crane v. Laird, 315 F.Supp. 837 (D.Ore, 1970), a serviceman formerly assigned to Fort Leonard

Wood, Missouri and ordered to Viet Nam by way of the Oakland, California overseas replacement station, failed to report to Oakland and later surrendered to civilian police in Oregon. The Court, in a case where the Superintendent of the local jail was the only named local respondent, found that the petition was properly filed in that district. See also, Meck, supra., 452 F.2d at 762, n.13; Hoover v. Kern, 466 F.2d 543 (5th Cir. 1972) (respondent local sheriff); Emma v. Armstrong, 473 F.2d 656 (1st Cir. 1972); Crane v. Coleman, supra; Laxer v. Cushman, supra.

In any event, Kasperek was dropped from the rolls of Camp LeJeune during the pendency of this action and thus now has no permanent duty station. If the district court could not exercise habeas corpus jurisdiction, Kasperek "would be left without a habeas forum, despite the fact that he is presently in custody." Hoover v. Kern, supra, 466 F.2d at 545.

United States ex rel Rowland v. Cleary, 397 F.Supp. 395 (E.D.Wis. 1975), is not to the contrary. There, the A.W.O.L. serviceman was never issued orders or otherwise taken into custody by the named respondent, 397 F.Supp. at 396-97. The Court recognized that, had petitioner been seized or issued orders by the local military authority or the Assistant U.S. Attorney, he would have been "in custody" for habeas corpus purposes. In any event, the case seems wrongly decided, in that it seems clear that, but for the habeas corpus action, the serviceman would have been placed in custody. It seems an artificial and wasteful distinction and contrary to the spirit of the Great Writ, to hold that, because the United States Attorney instructed the respondents not to "pick up" the serviceman because of the habeas corpus petition, that the petition does not lie, where,

absent that petition and a moment later, the serviceman would have been in custody.

Nor is Rudick v. Laird, 412 F.2d 16 (2nd Cir. 1969), to the contrary. There a serviceman who was on leave from his California duty station sought habeas corpus in the Southern District. He had had no contact with the military in New York, and no restraints were placed on him or orders directed to him within the territorial jurisdiction of the District Court. The Court held only that the petition was properly dismissed for lack of personal jurisdiction over the named respondents who were located in Washington, D.C. 412 F.2d at 21. Although some of the discussion could be read to hold that the petitioner was not in custody, that language should not be so read, in light of the clear holdings in Hammond v. Lenfest, supra. and Schonbrun v. Commanding Officer, supra., and in light of the Court's remark "undoubtedly subject matter jurisdiction exists. 28 U.S.C. §2241," 412 F.2d at 20. See United States ex rel Lohmeyer v. Laird, 318 F.Supp. 94, 96-98 (D.Md. 1970). Nor does the problem of forum shopping, alluded to by the court, 412 F.2d at 21, affect Kasperek's case. It is submitted that this issue is more a matter of venue than jurisdiction, cf. McKay v. Secretary of the Air Force, 306 F.Supp. 1252 (D.Mass. 1969); Lohmeyer, supra., and that Kasperek here brought suit in the proper venue: where the alleged fraudulent inducement occurred, and where all of the witnesses on that claim were located.

POINT II

KASPEREK IS ENTITLED TO RELIEF FROM HIS ENLISTMENT CONTRACT.

Much of the Government's brief concentrates on matters irrelevant to the issues before this Court. Although it is true that the proceedings in the District Court were focused primarily on Kasperek's fraudulent inducement claim,* Judge Curtin found that Kasperek's reliance on what he understood to be the recruiter's assurances, in light of the circumstances (particularly in light of the several months between the initial assurances in September 1974 and Kasperek's enlistment in March 1975), was not reasonable, and we have conceded that this finding was not clearly erroneous and have abandoned that claim. (See Appellant's Brief, pp. 1n, 6n). Consequently, only the breach of contract claim is before the court. Yet much of the Appellee's Statement of Facts and the argument in Point II is taken up with matters relevant only to the abandoned fraudulent inducement claim. Because of this mistaken emphasis, it is perhaps necessary to restate exactly what Appellant believes is at issue herein, and what is not.

---

*The case was tried below primarily on the fraudulent enlistment theory because the essential facts underlying the presently asserted breach of contract claim -- that the "bulk fuel" category job was not within the mechanical-electrical subprogram -- did not appear until the second morning of trial. Before then, the Recruiters' Manual (App. 3-31) read together with the "Statement of Understanding," seemed to counsel clearly to indicate that bulk fuel was within the range of jobs which Kasperek had been guaranteed; indeed, counsel was so assured by Sgt. Koponen at the Examination Before Trial, and Sgt. Koponen so testified at trial (App. 208, 211). It was only during direct examination of Koponen's superior, Captain Carras, that it was revealed that Kasperek had had no chance whatever to be assigned to the "bulk fuel" job because that job was not within the subprogram he had been signed up for (App. 218-19, 226, 242-43).

In this case, a rider to Kasperek's enlistment contract promised him that he would be selected for a job within the "mechanical-electrical" subprogram. (App. 1-2). One of the categories of jobs listed on the rider as within that subprogram is "construction, equipment and shore party." The booklet "Occupational Opportunities for Men and Women in the U.S. Marine Corps: A Guide for Counselors" (App. 3-31), lists "bulk fuel man" as one of the jobs within the "construction, equipment and shore party category." (App. 9). Testimony of Kasperek and his uncle below established that Kasperek wanted the "bulk fuel" job, although it is also apparent that he misunderstood the exact nature of that job. In short, when these two documents are read together, as they must be, they guarantee Kasperek that he would be selected for a job within the range that includes "bulk fuel." Put another way, Kasperek was guaranteed the chance to be selected for the job he desired. But, it was established below and found by the court (App. 258, 259) that contrary to the clear import of the documents, the bulk fuel job is in fact not within the mechanical-electrical subprogram, although Sgt. Koponen believed it was. Kasperek was thus not given the chance to be so selected.* Appellant submits that this failure of the Marine Corps to deliver the promised chance of selection for the job he wanted is a material breach of its promises to him which vitiates this contract and entitles Kasperek to relief from his enlistment.

In response to Appellant's argument that the contract documents "unmistakably promise Kasperek" a job within the specified range, the

---

*This case is thus like Wong v. Laird, 4 SSLR 3650 (N.D.Cal. 1971) (mis-cited as "SSLR 3650" in Appellant's opening Brief). In Wong, the petitioner contracted for an extra year of duty in a particular job, for which the Army failed to process him. The court held him entitled to relief from his enlistment contract.

Government asserts:

> Needless to say, the District Court reached no such unmistakable conclusion. (P. 13)

This is incorrect. During the testimony of Capt. Carras the judge questioning the witness extensively on this point. The following exchange occurred:

THE COURT: Captain, I hope I can get this straight. In Exhibit 12 under "E" which Mr. Kasperek initialed it says "ground sub-program, mechanical-electrical". Now, one of the "either" and one of the eithers is equipment and shore party.

THE WITNESS: Yes, sir.

THE COURT: Is that true?

THE WITNESS: Yes, sir.

THE COURT: In construction equipment and shore party. Now, under "construction equipment and shore party", that is the thirteen hundred series of "MOS's"?

THE WITNESS: Yes, sir.

THE COURT: Under that "bulk fuel man" is included?

THE WITNESS: Yes, sir.

THE COURT: Is that true?

THE WITNESS: Yes, sir.

THE COURT: So in fact a bulk fuel man would come under mechanical-electrical series sub-program?

THE WITNESS: According to the Marine Corps manual it is not one of the job guarantees under mechanical-electrical, sir. Sir, I prepared this before coming over.

THE COURT: I do not care what they do now.

THE WITNESS: This is back then, sir.

THE COURT: It would seem that from reading Exhibit 12 and reading Exhibit 1 which is sort of the recruiter's handbook, "Guide for Counselors", as it is entitled --

THE WITNESS: Yes, sir.

THE COURT: When you read this it would certainly appear to anyone who looks at it, whether or not he is a recruit or a recruiter or anyone else, that a bulk fuel man would be considered --

THE WITNESS: Yes, sir.

THE COURT: Under mechanical-electrical ground sub-program.

THE WITNESS: Yes, sir.

THE COURT: Can you explain why there is a difference?

THE WITNESS: Sir, explain for the Marine Corps, I think on a specific job guarantee, meaning mechanical-electrical or combat support, when they broke it down they did not define or put it in that book.

THE COURT: Let us say that a man, - a recruiter and a recruit discussed the fact that this man was interested in being a bulk fuel man and then he finished his boot training and he was signed up for the mechanical-electrical sub-program, then I suppose that under the rules and regulations as explained in the Marine Corps manual in effect at that time that he just could not be assigned to a 1391 "MOS".

THE WITNESS: Yes, sir. (emphasis added)

Appellant submits that the Court's finding was clear -- and, in light of the contractual documents, unavoidable -- that Kasperek was promised the

chance at a job within the specified range.*

Judge Curtin avoided the legal consequences we believe flow from that finding with the comment:

> It seems to the Court that under all of the circumstances, it did not make any difference ... if he was interested in aviation, it would appear clear that is not what he signed up to. (App. 259)

And again:

> In this case, I find that Mr. Kasperek was not misled. (App. 264)

Judge Curtin thus held that because Kasperek wanted to work with aircraft, he was not entitled to the benefit of the bargain he had in fact made; put another way, that because he had signed the contractual documents mistakenly believing they promised him one thing, he was not entitled to enforce his contract for what the documents actually promised him.

We submit that this reasoning is wrong. As argued at pp. 34-36 of Appellant's opening Brief, it is the objective expressions of assent that create contractual obligations. On this view, Kasperek's private misunderstanding about what the "bulk fuel" job was is irrelevant. The fact that Kasperek misunderstood what he was promised should not relieve the Marine Corps from living up to its promises.

---

*Judge Curtin also noted:

> Certainly, as far as the booklet and program, they ought to get that straightened out, cleared up, because in other cases, it could lead to a situation where a person is misled and in this case, I find that Mr. Kasperek was not misled. (App. 264)

The Government responds that Kasperek got exactly what he was guaranteed, one of the jobs in the field he signed up for. But that argument overlooks the fact that he specifically signed up for the chance to be chosen, in the luck of the draw, for the "bulk fuel" job, which chance his contractual documents clearly promised him and which chance was not in fact given him. His name was simply not in the pool of trainees from which "bulk fuel" men were chosen. If an investor were to submit a non-competitive bid for certain oil leases, and the agency holding the drawing for these leases failed to place his bid in the drum from which the winners were chosen, is there any doubt that he would be entitled to rescind and receive back his registration fee? If a person buys a raffle ticket, and the stub bearing his name is not placed in the drum from which the winner of the Cadillac is drawn, can there by any question but that he is entitled to a refund of the ticket price, in that he was denied the chance that he was promised? Appellant submits that this case is no different from those clear-cut situations, and that Kasperek is therefore entitled to relief from his enlistment.

CONCLUSION

For the reasons stated, the judgment of the District Court should be reversed and the case remanded with directions that an order issue discharging Kasperek from the United States Marine Corps.

Respectfully submitted,

ROBERT C. MACEK, ESQ.
Clinton House
556 Franklin Street
Buffalo, New York 14202
(716) 883-5000

PHILIP B. ABRAMOWITZ, ESQ.
815 Liberty Bank Building
Buffalo, New York 14203
(716) 856-5400
ATTORNEYS FOR APPELLANT